Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, *et al.*,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THOMAS L. CROFT*
THOMAS E. DOUGLASS*
THOMAS A. CROFT
One Mercantile Center,
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575
Counsel for Respondents Midcon Industries, Inc., f/k/a Goodrich Realty and Development Group, Inc., Carl H. Totsch, Richard M. Cohen, Morris Weissman, Michael Miller and Stanley Kreitman

JIM J. SHOEMAKE*
MICHAEL A. FISHER
100 North Broadway,
Suite 2000
St. Louis, Missouri 63102
(314) 241-6890
Counsel for Respondent Midwest Rubber Reclaiming Company

*Members of the Supreme Court Bar

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Page

THE QUESTION PRESENTED FOR REVIEW WAS NEITHER DECIDED NOR EXAMINED BY EITHER COURT BELOW AND WAS EXPRESSLY REJECTED BY THE EIGHTH CIRCUIT AS GROUNDS FOR ITS DECISION WHICH WAS BASED ENTIRELY ON PETITIONERS' LACK OF DAMAGES AND THE LACK OF UNFAIRNESS IN THE GOING-PRIVATE MERGER 1

The Court Of Appeals' Decision Was Based On Petitioners' Lack Of Damages And Lack Of Unfairness In The Going-Private Merger 2

Certiorari Is Plainly Inappropriate 6

CONCLUSION 9

TABLE OF AUTHORITIES CITED

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 6

Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976) 4,5

Lawn v. United States, 355 U.S. 339 (1958) 6

Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. denied, 49 U.S.L.W. 3332 (Nov. 3, 1980) 7,8

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 5

Nye v. Blyth Eastman Dillon & Co., Inc., 588 F.2d 1189 (8th Cir. 1978) 4,5

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) . 5

Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), cert. denied 419 U.S. 873 (1974) 7

Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978) 7,8

United States v. Ortiz, 422 U.S. 891 (1975)..... 6

Statutes and Rules:

15 U.S.C. §78 n(e) [Williams Act, Section 14(e)] 1,2,6,7,8

F.R.A.P. 40 (a) 7

No. 80-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, *et al.*,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THE QUESTION PRESENTED FOR REVIEW WAS NEITHER DECIDED NOR EXAMINED BY EITHER COURT BELOW AND WAS EXPRESSLY REJECTED BY THE EIGHTH CIRCUIT AS GROUNDS FOR ITS DECISION WHICH WAS BASED ENTIRELY ON PETITIONERS' LACK OF DAMAGES AND THE LACK OF UNFAIRNESS IN THE GOING-PRIVATE MERGER

Petitioners frame the issue in this case as follows:

> Do non-tendering shareholders *who were damaged,* but did not trade or rely on material misstatements, omissions and market manipulation by the offeror, have a cause of action under Section 14(e) of the Williams Act, 15 U.S.C. §78n(e). [emphasis added].

Petition at ii.

Petitioners' formulation of the question presented for this Court's discretionary review *presumes the fact of damage* to Petitioners in direct conflict with the holding of the Court of Appeals and seeks this Court's determination of an issue not raised by this case: shareholder *standing* under Section 14(e) of the Williams Act, 15 U.S.C. §78n(e).[1]

This standing issue was neither decided nor examined by either the District Court or the Court of Appeals nor was it necessary to either court's decision. Indeed, the Court of Appeals specifically determined that the question of standing was not before it, finding the resolution of the standing issue unnecessary in light of the fact that Petitioners simply had suffered no damages from the acts of which they complained. For these reasons and those more fully developed below, Respondents submit that the Petition for Certiorari should be denied.

The Court Of Appeals' Decision Was Based On Petitioners' Lack Of Damages And Lack Of Unfairness In The Going-Private Merger

In 1973, the Shapiros purchased 800 shares of Midwest stock for a total of $9,144.10. Petitioners do not allege that this purchase was tainted by any illegality. In 1974 and early 1975, Mid-

---

[1]In their brief, Petitioners make perfectly clear that standing is the issue which they hope to have this Court decide. For example, see page 30 where Petitioners characterize the issue here as that of "non-tenderer standing". Throughout their brief, Petitioners speak in terms of non-tenderers' "cause of action" and "right to sue", see pp. 16, 17, 18, 20, 24, 25, 27, 28 and 31. As demonstrated *infra*, the Court of Appeals simply did not determine that non-tendering and non-relying shareholders had no standing, no cause of action or could not sue under Section 14(e). Had it done so, the Court would not have embarked upon the lengthy and careful analysis of the "fairness" issue (Pet. App. A at pp. 23-28) and would not have observed that its determination concerning Petitioners' lack of trading or reliance "does not end our inquiry, of course." (Pet. App. A at 22). See also footnote 11 of the Court's opinion (Pet. App. A at 22-23).

con gained control of Midwest Rubber by purchasing shares from various large shareholders of Midwest Rubber at $15.00 per share. In March 1975, Midwest sent an offering circular to its shareholders, announcing an exchange offer consisting of a $12.00 face amount subordinated debenture for each share of stock. The Shapiros did not rely upon the circular and did not sell their shares. Instead, in March 1978, pursuant to an additional offer, the Shapiros exchanged or became entitled to exchange each of their shares for a $45.00 face amount debenture, which they concede was worth at least $40.00. As found by the Eighth Circuit, "[h]aving invested $9,144.10 in Midwest common stock in 1973, they now hold debentures with a face value of $36,000." (Pet. App. A at 12)

Though they neither relied nor traded upon the offering circular, Petitioners assert that the March 1975 circular contained a number of misrepresentations and that, as a result, they are entitled to damages despite the four-fold increase in the value of their investment as of March, 1978.

Throughout this litigation, the Shapiros have measured their claimed damages by the difference between the $15.00 per share price privately offered to the former Midwest directors and the $7.35 per share value Petitioners ascribe to their shares at the time of the alleged fraud.[2] In both the District Court and the Court of Appeals, Petitioners have sought arduously to ignore the relevance of the fact that, as a result of the 1978 offer, they received a debenture worth at least $40.00 for each share of their stock. As a legal basis for disregarding the substantial profit which Petitioners have realized by virtue of their ownership of Midwest shares, they urged the Court of Appeals to invoke the

---

[2]In their principal brief in the Court of Appeals Petitioners stated: "The difference between the price which was privately offered to the former directors of Midwest ($15.00) and the true value of the Midwest securities at the time of the fraud ($7.35) is the proper measure of damages." The Eighth Circuit interpreted the Petitioners damage theory accordingly (Pet. App. A at 23).

rules of *Harris* v. *American Investment Co.*, 523 F.2d 220 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) and *Nye* v. *Blyth Eastman Dillon & Co., Inc.*, 588 F.2d 1189 (8th Cir. 1978) and fix their damages in March of 1975—the time of the alleged fraud's commission. Thus, Petitioners argued, the bonanza realized by them in 1978 did not preclude additional recovery.

The Eighth Circuit agreed with Petitioners that the *Harris-Nye* damage formulations do operate to fix damages in a securities fraud case at the time the fraud is committed or reasonably discovered, and that after-fraud fluctuations in the stock's value do not affect the computation of damages. These damage formulations apply what is commonly termed the "second investment decision" rule, and do not require a securities fraud plaintiff to mitigate its damages by either selling or retaining stock after discovery of the fraud. *See Harris* v. *American Investment Co., supra,* 523 F.2d at 228.

Crucial to the application of the "second investment decision" rule, however, is an *initial* investment decision upon which liability or damages can be predicated, and the Court of Appeals so found (Pet. App. A at 21-22). Thus where the wrong alleged has had no effect on a plaintiff's initial investment decision "either directly (through actual reliance) or indirectly (by affecting the market upon which the party traded)" (Pet. App. A at 21), the damage rules of *Harris* and *Nye* have no logical application. Therefore, the Court of Appeals properly determined the *Harris-Nye* damage formulations did not provide a basis for showing damages to the Shapiros or the other members of their class.

Significantly, this was not the end of the Court of Appeals' analysis; rather, the Court searched for some other theory under which the Shapiros might show damages. Before beginning its inquiry, however, the Court had occasion to note:

> We note in passing that there may be some question whether the Shapiros have standing to advance their claim

> under 15 U.S.C. 78n(e) (1976). Cf. *Hundahl* v. *United Benefit Life Ins. Co.*, 465 F.Supp. 1349, 1369 (N.D. Tex. 1979) (denying standing to plaintiffs who clearly did not rely on alleged misrepresentations in the tender offer materials). *Nonetheless, the district court did not consider this issue and it is not before us on appeal.* [emphasis added].

(Pet. App. A at 22-23, n.11).

After this observtion, the Court came to grips with the theory of damages which Petitioners had espoused consistently prior to the Eighth Circuit's ruling against them. That theory, a claim for the alleged "control premium" paid privately to other Midwest shareholders, was properly deemed by the Eighth Circuit to be premised on "some notion of fairness" (Pet. App. A at 23).[3] Noting that a takeover such as the one presented in the instant case raised basic fairness problems in the division of the purchase price among former shareholders, the Court of Appeals recognized that it may inquire into the fairness of the terms of such a transaction to determine the appropriate relief for procedural irregularities such as those alleged by Petitioners (Pet. App. A at 25)[4].

Thus, the Court turned to an analysis of the entire takeover procedure and correctly concluded that the Shapiros were harmed, if at all, only when they were frozen out in 1978 when the takeover was consummated. This observation necessarily followed from the Court's earlier determination that, in the absence of trading or reliance, the *Harris-Nye* damages formulations are logically inapposite. The question of fairness was resolved for the Court of Appeals very simply: First, the Shapiros had never challenged the terms of the going-private

---

[3] *Cf. Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

[4] *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

merger in 1978, (Pet. App. A at 26-27); and second, the substantial profit realized by the Shapiros as a result of the merger rendered an unfairness claim on their behalf suspect. As the Court noted:

> The fact that the Shapiros eventually received a $45 debenture for each share of their Midwest stock suggests the reasonable inference that they can advance no personal claims of unfair treatment in the takeover process.

(Pet. App. A at 27, n.16). As a consequence, the Court concluded that the Shapiros could not show damages resulting from unfairness in the takeover procedure. Only after this determination did the Court of Appeals conclude that the District Court properly entered summary judgment against the Shapiros.

Certiorari Is Plainly Inappropriate

As demonstrated above, the question Petitioners present to this Court is simply not an issue in this case. It is, therefore, not a proper subject for review.

Even if the issue of standing under Section 14(e) of the Williams Act were somehow involved in this litigation, discretionary review would still be inappropriate in light of the cardinal principle that this Court will not consider issues in a vacuum without the benefit of analysis by the courts below. *See, e.g. Lawn* v. *United States,* 355 U.S. 339, 362-363, n.16 (1958); *see also United States* v. *Ortiz,* 422 U.S. 891, 898 (1975); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970). The Court of Appeals specifically determined that the standing issue was not before it on appeal, and, because it had not been raised at the District Court level, no analysis of this issue by either court below exists to assist this Court in its deliberations. Nor can any discussion of the issue be found in the briefs filed by the

parties prior to the Eighth Circuit's ruling on the merits.[5] Under these circumstances, certiorari should not issue.

Finally, even if the question of standing under Section 14(e) of the Williams Act had been addressed and decided by the Court of Appeals, the supposed "conflict among the Circuits" described by Petitioners is more illusory than real.

Petitioners contend that the Eighth Circuit's decision is at odds with the holdings of the Fifth Circuit in *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied* 419 U.S. 873 (1974) and the Second Circuit in *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).[6] Respondents are loath to address the non-issue of standing under 14(e) and create the impression that this question is somehow involved in this case. Suffice it to note that the Fifth Circuit specifically stated that its holdings in *Smallwood* did not require it to consider "questions of reliance, causation, and the appropriate measure of damages," 489 F.2d at 608, and that the

---

[5]Petitioners first raised the issue they now present to this Court in their Petition for Rehearing. That Petition was denied (Pet. App. B) without a request for briefing from Respondents by the Court of Appeals. See F.R.A.P. 40(a).

[6]In the brief which Petitioners originally filed with this Court, Petitioners had argued that a conflict existed between Eighth and Second Circuits on the one hand and the Third and Fifth Circuits on the other. This argument was the result of Petitioners' mistaken assumption that *Stull* v. *Bayard, supra,* was a Third Circuit case. Thus, Petitioners originally concluded, the recent ruling of the Second Circuit in *Lewis* v. *McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3332 (November 3, 1980) (holding reliance an essential element of a cause of action under 14(e)) "would have come as a surprise to the panels of the Third and Fifth Circuits." Because *Stull* is a Second Circuit case, perhaps it is Petitioners and not the Third and Fifth Circuits who are surprised. Respondents have been informed that Petitioners intend to recall their brief for correction.

Second Circuit's decision in *Stull* was based entirely on the fact that plaintiff's claim was time-barred. The Second Circuit's discussion of standing under 14(e) in *Stull* was mere dictum, premised on the stated assumption that the plaintiff had a right to sue. 561 F.2d at 432-33. Moreover, that Circuit's most recent pronouncement concerning reliance under 14(e) in *Lewis* v. *McGraw,* 619 F.2d 192 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3332 (Nov. 3, 1980) is in perfect harmony with Petitioners' characterization of the Eighth Circuit's holding in the instant case. See note 6, *supra.*

CONCLUSION

For the reasons set forth above, Respondents submit that the Petition for Certiorari should be denied. Though Petitioners angle masterfully in search of discretionary review, they bait the hook with red herring.

Respectfully submitted,

THOMAS L. CROFT*
THOMAS E. DOUGLASS*
THOMAS A. CROFT
One Mercantile Center
Suite 2900
St. Louis, MO 63101
(314) 621-8575

Counsel for Respondents Midcon Industries, Inc., f/k/a Goodrich Realty and Development Group, Inc., Carl H. Totsch, Richard M. Cohen. Morris Weissman, Michael Miller and Stanley Kreitman

JIM J. SHOEMAKE*
MICHAEL A. FISHER
100 North Broadway
Suite 2000
St. Louis, MO 63102
(314) 241-6890

Counsel for Respondent Midwest Rubber Reclaiming Company

---

* Members of the Supreme Court Bar